IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No.

ERNEST WEISS, IRENE WEISZ, FERENC WEISZ and GEZA FRIEDMAN,

Petitioners,

—against—

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

1. Jurisdiction

The facts with regard to jurisdiction have been set forth in the foregoing petition.

2. Statute and Regulations Which Are Involved Herein

The statute allegedly violated read as follows: (Sec. 6, Chap. 508, 54 Stat. at L. 712): "An Act to expedite the Strengthening of the National Defense."

"Sec. 6. Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in the prohibition or curtailment contained therein. * * * (Penal Provision) * * * The authority granted by this section shall terminate June 30, 1942, unless the Congress shall otherwise provide."

On July 2, 1940 (Government's Exhibit 1, in evidence) the President issued his Proclamation No. 2413 whereby the administration of Sec. 6 was delegated to an Administrator of Export Control and it was further proclaimed that on and after July 5, 1940, certain named articles and materials should not be exported from the United States, "except when authorized in each case by a license" issued by the Secretary of State in accordance with the rules to be stated from time to time by the said Administrator. Among the named articles was "Q—Platinum Group Metals."

3. Statement of the Case

The basic facts have been stated in the foregoing petition. Certain other facts will be called to the attention of the Court, particularly in the point discussing the evidence before the Trial Court.

4. Summary of Argument

1. The Circuit Court of Appeals erred in holding that there was no variance from the charge of a single con-

spiracy to the proof of three separate and distinct conspiracies.

2. The Circuit Court of Appeals erred in holding that the statute upon which the indictment is based is constitutional.

3. The Circuit Court of Appeals erred in holding that the statute upon which the indictment is based did not terminate on June 30, 1942, but was extended by Act of June 30, 1942.

4. The Circuit Court of Appeals erred in holding that the defendants were not prejudiced by irrelevant evidence and that the evidence was sufficient to sustain the convictions.

5. The Circuit Court of Appeals erred in holding that the trial Court did not commit reversible error in admitting platinum and Friedman's bank records as part of the Government's case against all of the defendants.

5. Argument

POINT I

The Circuit Court of Appeals erred in holding that there was no variance from the charge of a single conspiracy to the proof of three separate and distinct conspiracies.

This proposition is also considered and discussed in the brief submitted on behalf of the defendants Rosenberg, Freier and Eisler.

A fatal variance occurred affecting the substantial rights of the defendants. Three different and disconnected conspiracies were proven at the trial.

Berger v. *United States*, 295 U. S. 78;
United States v. *Siebricht* (C. C. A. 2) 59 F. 2d 976;
Terry v. *United States* (C. C. A.) 7 F. 2d 28.

There was a material variance in this case. The indictment charges one offense, the proof adduced by the Government show three distinct different offenses. The *main conspiracy*, which is the one alleged in the indictment involved the defendants Rosenberg, Freier, the Government witnesses, Koppel, Abe and Hersch Neumann, and the named co-conspirator Arnold Weisz. The defendant Eisler is involved in this conspiracy through hearsay. The *Canadian conspiracy* involved the same group, except Eisler, and allegedly included the defendants Ernest Weiss, Irene and Ferenc Weisz. The third conspiracy, adduced by the Government were the dealings between Arnold Weisz and the named conspirator in the indictment, Mezenen. The defendant Friedman is brought into the case by reason of this third conspiracy in view of his association with Arnold Weisz.

The *main conspiracy* and the *Canadian conspiracy* are definitely different offenses, one involved shipments to Portugal, the other a shipment to Canada. The indictment charges no crime in connection with Canada. The Court however allowed testimony of the *Canadian conspiracy* since the platinum there involved was later used in connection with the *main conspiracy*. The third conspiracy (*Flushing affair*) is wholly unrelated to the other two. The dealings of Arnold Weisz and Mezenen were not part of or the same venture of the defendants in the *main* and *Canadian* conspiracies.

Since different conspiracies were proven and only one conspiracy is charged, a material and fatal variance occurred.

United States v. *Siebricht* (C. C. A. 2) 59 F. 2d 976.

The variance charged here is one which clearly affected the substantial rights of the parties.

Berger v. *United States,* 295 U. S. 78.

It is settled law that where one conspiracy is charged, proof of different and disconnected ones will not sustain a conviction.

POINT II

The Circuit Court of Appeals erred in holding that the statute upon which the indictment is based is constitutional.

This proposition is also fully considered and discussed in the brief submitted on behalf of the defendants Rosenberg, Freier and Eisler. This Court is respectfully referred to that brief for the authorities and full discussion of this constitutional question.

Sec. 6 of the Act of July 2, 1940 (54 Stat. at L. 714) upon which the indictment is based, clearly grants legislative powers to the President. It falls within the type of legislation proscribed in the N. R. A. cases,

Schechter Poultry Corp. v. *United States,* 295 U. S. 495;
Panama Refining Co. v. *Ryan,* 293 U. S. 388;

and also

United States v. *Butler,* 297 U. S. 1.

The statute here involved is not one involving foreign affairs, such as the one sustained in *United States* v. *Curtiss-Wright Exp. Co.*, 299 U. S. 388, but is definitely one involving an internal affair, which is within the sole province of Congress to control and determine (*Gorin* v. *United States*, 312 U. S. 19; *United States* v. *Schwimmer*, 279 U. S. 644, 650). This statute is clearly distinguishable from the one before the Court in the case of *United States* v. *Von Clemm*, 136 F. 2d 968. In the *Von Clemm* case the statute and the order of the President fell within the "sphere of foreign relations and is thus free from the limitations imposed on delegated authority"; and in that case it is important to note the Order of the President was confirmed and approved by a retroactive act of Congress, thereby curing the question of improper delegation in the original statute. Sec. 6, here, dealing with our national defense, does not fall within the "sphere of foreign relations", our national defense is an internal matter; nor was the President's Order, which the defendants here allegedly violated, confirmed by any subsequent act of Congress.

Sec. 6, it is submitted, was definitely an improper delegation of power to the President. As such the statute being void, the judgment against the defendants must be reversed and the indictment dismissed.

POINT III

The Circuit Court of Appeals erred in holding that the statute upon which the indictment is based did not terminate on June 30, 1942, but was extended by Act of June 30, 1942.

This proposition is likewise fully discussed in the brief submitted on behalf of the defendants Rosenberg, Freier and Eisler and this Court is respectfully referred to such discussion for the authorities in support of this Point.

Sec. 6 of the Act of July 2, 1940 (54 Stat. at L. 714) upon which the indictment here is based, expired on June 30, 1942. This statute was a peace-time measure and related to strengthening the national defense. Section 6 particularly, referred to military articles and their exportation. Said statute contained no savings clause.

On June 30, 1942, Congress passed 56 Stat. at L. 463. This Act intended to amend Sec. 6 of the Act of July 2, 1940. The Act of June 30, 1942, however, was a war-time measure. It extends the power of the President, it covers all articles of exportation and is not limited to military articles, it grants power to the Board of Economic Warfare in the execution of the Act, and it contains a savings clause.

It is submitted that the Act of July 2, 1940, was impliedly repealed by the Act of June 30, 1942. The two acts are different and one is not an amendment of the other so that the first Act is kept alive for purposes of prosecution for a violation of it before such alleged amendment.

> *United States* v. *Tynen,* 11 Wall. 88;
> *Posadas* v. *National City Bank,* 296 U. S. 497, 503;
> *Murphy* v. *Utter,* 186 U. S. 95, 105;
> 59 *Corpus Juris* 919.

Since Sec. 6 contained no savings clause and the defendants were brought to trial after its termination, the prosecution was therefore improper and the judgment of conviction herein must be reversed.

> 22 C. J. S. Criminal Law, Sec. 27, p. 79, and cases cited therein under note 87.

POINT IV

The Circuit Court of Appeals erred in holding that the defendants were not prejudiced by irrelevant evidence and that the evidence was sufficient to sustain the convictions.

A conspiracy is a partnership for criminal purposes.

U. S. v. *Kissel,* 218 U. S. 601, 608.

The Neumann brothers and Koppel showed no concern for any of the persons charged by the Government with having had any connection with the platinum exportation. It must be presumed that these chief witnesses did not omit anything. On their testimony, it is evident that they, themselves, did not consider the defendants Geza Friedman, Ernest Weiss, Irene Weisz and Ferenc Weisz as associates. None of these defendants contributed to the funds invested in platinum and none shared in the proceeds of sale.

Each has been brought in by a series of unrelated acts, by their own bank records, by hearsay statements or by suspicion aroused by reason of their relationship with Arnold Weisz.

The argument with respect to the insufficiency and prejudicial effect of the evidence against the defendants Geza Friedman, Ernest Weiss, Irene Weisz and Ferenc Weisz is separately set forth below.

Geza Friedman

The testimony of the Government's chief witnesses, Hersch Neumann, Abe Neumann and Alexander Koppel established beyond doubt that Friedman was not a "partner" in the Main Conspiracy.

Friedman's name first appears in the record in Hersch Neumann's testimony (166) in which the witness said that the "partners", during the week of April 7, 1941 (163), discussed the possibility of sending platinum to Canada. Neumann said that Arnold Weisz told the "partners" that he had learned from Friedman (upon Friedman's return from Canada) that a profit could be made by sending platinum to Canada. That "hearsay" statement is the sole link connecting Friedman with the "Canadian Affair".

Friedman had actually gone to Canada on March 13, 1941, to obtain a permanent visa (3830). That he made the trip for that purpose has never been disputed. He denied that he had talked to Arnold Weisz about exporting platinum to Canada (3846). Arnold Weisz did not testify.

The indictment had cited Friedman's trip to Canada as one of the overt acts (#11) in furtherance of and for the purpose of effecting the object of the conspiracy. When Friedman's counsel objected to Neumann's remark about Friedman, the Court stated that it would be stricken out if the Government failed to "connect it up" (167). Yet the Court, in its charge to the jury, asked the following question: "did he (Friedman) when he went to Canada, prior to April 9, make inquiries as to the price of platinum?" (4668).

Hersch Neumann's remark (166) was heard by the jury on September 23, the first day of the trial. The Court's charge was given on October 22. Thus the jury was directed to consider hearsay evidence, presented a full month before, in deciding whether Friedman had inquired in Canada about the price of platinum, and, if they concluded that he did so, to weigh that finding against him in deciding that he knew about the scheme to export platinum to Continental Europe and had agreed to take some part in the venture.

He had gone to Canada on March 13 and had been with Arnold Weisz in Flushing on June 4, 1941, a period em-

bracing almost the entire life of the conspiracy. If the jury decided that Friedman knew about the platinum dealings of the conspirators before March 13th, it is certain that no consideration would have been accorded his protestations that he had been an innocent participant in the "Flushing Affair".

Friedman's bank records were put in evidence by the Government (4063-4069) and the fact brought out that he had deposited about $30,000 in the first seven months of 1941 (4070). The inference was plain enough—that Arnold was sharing his illegal profits with Friedman (4062). But a full explanation by him of his finances was not permitted (4079-4083). Yet the Court in its charge to the jury (4673) after referring to these bank records and, particularly, to the deposits of $7,700.00 made in April, 1941 (4062), asked: "Now, where did that money come from?" thereby not only creating a basis for speculation by the jury but also indicating that it was dishonest money.

Where, indeed, did Friedman's money come from? Or specifically, in view of the Court's emphasis upon the figure, where did the April, 1941, deposits of $7,700.00 come from? The record clearly shows where these deposits *did not come from!*

In connection with the principal conspiracy, the Neumanns received the proceeds of the sale of the first shipment in April (1433). But Arnold's share was less than $1,000.00 (1462). The proceeds of the second shipment were not received until May 12, 1941 (1502). Arnold Weisz had been arrested on the conspiracy charge and was still in jail when the proceeds of the third shipment had been received (399). The "partners" never recovered the proceeds of the fourth shipment (838). Mezenen testified that two shipments by Clipper were consummated (2912-15), but the first shipment did not go to Lisbon until some time in May (2910-11). Arnold Weisz could not have received

the proceeds of the Clipper shipments until the latter part of May.

The conclusion is inescapable that Friedman's April deposits of $7,700.00 (which, incidentally, exceeded his average monthly deposits), did not include Arnold Weisz's illegal profits in the conspiracy charged in the indictment. These funds, therefore, must be presumed to have been honestly acquired by Friedman. It follows that there was no "access of wealth" as described by the learned Circuit Court (p. 2198 of the Decision) which held that the Trial Court committed no reversible error in admitting Friedman's bank statements showing "large deposits during the period here involved" (p. 2197 of the Decision).

Another element presented by the Government in support of its case against Friedman is the fact that Friedman had printed or written various cables and other papers for Arnold Weisz. It is contended by the Government (and obviously accepted as a fact by the Circuit Court) that Friedman wrote the delivery instructions given Mezenen, but the record is confusing in that regard.

Arnold Weisz lived in Friedman's home. Friedman testified that on occasions Arnold had asked him to write cables or post cards or to address letters (3879). At Arnold's request, Friedman, some time after his return from Canada, accompanied Arnold to an attorney, Berger, who was told by Arnold that he intended to export platinum. Arnold retained Berger to inquire about a license (3841-3845). Friedman explained that he did not know there was anything wrong with Arnold's handling of platinum (3957).

As stated above, the record relating to the delivery instructions given by Arnold Weisz to Mezenen is confusing. Government Exhibits 52 to 58 were identified by Mezenen (2935-2947). Exhibit 54 contained only a name and address written in ink. Miller, an F. B. I. employee, gave an opinion that Friedman wrote the name and address, but the

identity of the person who prepared Exhibit 58, a letter of instructions, was not brought out. The Court, in its charge to the jury, mentioned "letters" written by Friedman for Arnold Weisz but did not remind the jury that the Government had not connected Friedman with the letter of instructions introduced as Exhibit 58.

Arnold Weisz's scheme to export platinum by Clipper plane was unquestionably a solo venture. He concealed from his "partners" his association with Mezenen (504-6). To obtain the platinum he delivered to Mezenen, Arnold used Felsenberg, obviously because he did not want the others to know about it. A very significant fact in connection with the purchase of the platinum used for the Clipper shipments is that Arnold Weisz did not employ Friedman for that purpose. The record shows that the "partners" were not particularly secretive in buying the platinum used in the shipments by sea.

The Government contends that there was sufficient circumstantial evidence to warrant the finding of the jury insofar as Friedman is concerned. But the evidence is lacking in substance and does no more than create a suspicion of the existence of the fact to be established. It is settled law that where a finding is based upon circumstantial evidence "the circumstances relied upon must be not only consistent with the guilt of the defendants, but must be inconsistent with their innocence." *Shannabarger* v. *United States* (C. C. A. 99 F. 2d 957, 961).

In accord see:

Zito v. *United States* (C. C. A. 7) 64 F. 2d 772, 775;

Young v. *United States* (C. C. A. 5) 48 F. 2d 26, 27;

Kassin v. *United States* (C. C. A. 5) 87 F. 2d 183, 184;

Dahly v. *United States* (C. C. A. 8) 50 F. 2d 37, 43.

The cumulative effect of the speculations and inferences created by the testimony and evidence in connection with Friedman and the further inferences, innuendos and speculations presented in the charge to the jury, clearly presented a situation to the jury, that even if this defendant (Friedman) was not a member of the conspiracy group, he must be guilty of something;—all that money, living with one of the conspirators, doing him favors, lending him money, taking him to a lawyer, sending a cable using the letter "P". The Court said in *United States* v. *Silva,* 131 F. 2d 247, 249:

> "* * * There is no magic about a count charging conspiracy. It is simply an accusation of a distinct crime and evidence in support of it must be so clear and convincing as to leave no reasonable doubt. The government merely fails in its proof when its evidence but creates a sort of a mystery as to which one guess is as good as another. *Copeland* v. *United States,* 5 Cir. 90 F. 2d 78; *Shannabarger* v. *United States,* 8 Cir. 99 F. 2d 957; *Kassu* v. *United States,* 5 Cir. 87 F. 2d 183.
>
> "Reversed."

The words of the Circuit Court in the case of *Marcante* v. *United States* (10th Cir.) 49 F. 2d 156, is apropos in view of the attending factors here involved (p. 158):

> "* * * If it extremely difficult for an experienced judge to trace the skeins of scattered testimony to so many individuals; with inexperienced jurors, such complicated testimony is too apt to become a confused jumble and a verdict to represent an impression that the defendants are guilty of something, with little reference of the crime for which they are charged."

It is submitted that the evidence against Friedman is insufficient, and that the doubt which may have existed, according to the Circuit Court of Appeals, should have been resolved in his favor.

Ernest Weiss

Financial records also play an important part in the Government's case against Ernest Weiss. A statement from Ernest Weiss' bank (Gov't Ex. 37b) showed that on May 8, 1941, there was credited an item of $8,943 (1394). This amount had been forwarded by one Pancado Mores from Portugal (4329). Ernest Weiss paid the full amount to his brother, Arnold Weisz (4324), who was in the business of foreign exchange (2348).

The brief of the United States on the appeal to the Circuit Court cited this deposit in the summary of the evidence against this defendant. It is mentioned again in the decision affirming the conviction (p. 2196 of the Decision) in which the Circuit Court said:

> "In addition to Ernest Weiss's activities in connection with the Canadian transaction, the evidence showed a payment to his bank account from the Chase National Bank of $8,943; and the jury was not limited in the inferences it might draw by his own testimony that he knew no more than that this money belonged to his brother Arnold and that he paid it all to Arnold."

But the record again indicates that this money could not have represented funds payable to Arnold Weisz in connection with the criminal activities charged in the indictment.

It is obvious that the Pancado Mores payment could not have arisen out of the Main Conspiracy. Abe Neumann paid Arnold Weisz less than $1,000. as his share of the first shipment (1462). The Neumanns received the full proceeds of the second shipment on May 12, 1941.

A careful reading of the testimony of the Government's witness, Mezenen (2907-2910) shows that the first package of platinum involved in the "Flushing Affair" was not delivered in Portugal until after May 8th, the date the sum of $8,943. had been credited to Ernest Weiss' bank account in New York.

Ernest Weiss allegedly took some platinum to Canada and he returned this platinum to his brother Arnold without disposing of it. Arnold Weisz returned the platinum to his group of co-conspirators, Abe Neumann, Hersch Neumann, Koppel, Rosenberg and Freier. The group thereafter used this platinum for shipment to Portugal. Ernest Weiss was not a member of this group. There is not a bit of evidence to make him a party to the conspiracy charged in the indictment.

The Court in its charge to the jury, however, charged if Ernest Weiss knew that the platinum he brought back was to be used by his brother and others for the offense charged in the indictment, such knowledge could be considered by the jury in determining whether "he was a part and parcel of the conspiracy.". The Court in its charge said (4663-4666):

> "Of course, the exportation to Canada is not the crime charged in the indictment herein; and if it was his (Ernest Weiss) only act in relation to the conspiracy charged in the indictment, he would not be guilty. But did he do more than that? Did he bring back to this country the platinum which had been given to him to take to Canada, with the knowledge of the desire of his brother and the others who may have been conspirators, to sell at a large profit abroad? And therefore, you must consider whether in doing that, if he was doing something more than the taking of the platinum to Canada, and whether bringing it back where it might be sold abroad, if he knew that is what they were doing

with the platinum and that was the reasonable use to which it was to be put, then it is for you to say whether or not he was a part and parcel of the conspiracy.

"• • • Was he part and parcel of this conspiracy, or was he just a side issue, whose only part in the transaction was to go to Canada with some platinum to sell, or, in fact, he did not take any platinum at all? And if he did take, when he brought it back, did he know he was bringing it back to be used for transportation?

"Of course, you have to judge the actions not only by the spoken word, but by the surrounding circumstances. Was the man just used for this particular purpose, without any knowledge, or did he know what was going on; and did he lend himself to the scheme? The selling in Canada would not have been sufficient to charge him with this conspiracy alleged in this indictment. And if he sold the platinum in Canada, that would have been the end of it, but he did not sell it; he brought it back. What did he bring it back for? Did he know the use to which it was intended to be put?"

It is clearly indicative that Ernest Weiss' guilt of the crime charged was to be based on his knowledge of the subsequent acts of the main conspirators.

There is no proof that Ernest Weiss was part of the plan or scheme charged in the indictment. "Conspiracies cannot be established by a mere suspicion nor does the evidence of mere relationship between the parties or association show a conspiracy" (15 C. J. S. *Conspiracy* Sec. 93, p. 1150). The fact that Ernest Weiss may have had knowledge of the conspiracy, did not *ipso facto* make him privy to it. There must be some evidence to show that Ernest Weiss agreed to take some part in the venture.

United States v. *Kissel*, 218 U. S. 601, 608;
United States v. *Dellaro* (C. C. A. 2d), 99 F. 2d 781.

The fact that Ernest Weiss committed a wrong in taking the platinum to Canada cannot by implication involve him in another wrong committed by others who used the same platinum, regardless of whether he knew the subsequent use to be made of the platinum by the others. It is submitted that the Court erred in submitting the case against Ernest Weiss on the theory of knowledge on his part as to the use of the platinum "to which it was intended to be put" by the group of which he was not a member. In support of this proposition, this Court is referred to the decision in the case of *United States* v. *Peoni*, 100 F. 2d 401, where the defendant Peoni in the court below was found guilty of a conspiracy to possess counterfeit bills. The evidence in that case showed that Peoni sold the counterfeit bills in question to one Regno; and Regno sold the same bills to Dorsey. Peoni was convicted of being an accessory to Dorsey and a co-conspirator to a plan whereby Dorsey obtained possession of the bills for utterance. The Court reversed the conviction, saying at page 402:

> "• • • Peoni was not an accessory to Dorsey's possession; his connection with the business ended when he got the money from Regno, who might dispose the bills as he chose; it was no moment to him whether Regno passed them himself and so ended the possibility of guilty possession or (p. 403) whether he sold them to a second possible passer. His utterance of the bills was indeed a step in the casual chain which ended in Dorsey's possession, but that was all. Perhaps he was Regno's accessory.
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> "• • • • •
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> "The same reasoning applies to the conspiracy count. Assuming that Peoni and Regno agreed that Regno should have possession of the bills, it is absurd to say

that Peoni agreed that Dorsey should have them from Regno. Peoni knew that somebody besides Regno might get them, but a conspiracy also imparts a concert of purpose, and again Peoni had no concern with the bills after Regno paid for them. At times it seemed supposed that, once some kind of criminal concert is established, all parties are liable for everything any one of the original participants does, and even for what those do who join later. Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it. The confusion is perhaps due to the fact that everything done by the conspirators—including the declarations of later entrants—is competent evidence against all, so far as it may fairly be thought to be in execution of the concert to which the accused is privy, though that doctrine too is often abused."

The Court's enunciation in *United States* v. *Falcone*, 109 F. 2d 579, aff'd 311 U. S. 205 is also applicable, where it said (581):

"• • • Civilly, a man's liability extends to any injuries which he should have apprehended to be likely to follow from his acts. • • • There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy • • •, his attitude • • • must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an

unlawful use; he must in some sense promote the venture himself, make it his own, have a stake in its outcome."

The proof here is insufficient to make Ernest Weiss one of the conspirators involved in the count charged in the indictment. He did not "in some sense promote the venture himself, make it his own, have a stake in its outcome."

See:

United States v. *Silva* (C. C. A. 2), 131 F. 2d 247.

The evidence creates no more than a suspicion, and as such was insufficient to support a conviction.

Center v. *United States* (C. C. A. 4), 96 F. 2d 127, 130.

"Circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt" (*Kassin* v. *United States* (C. C. A. 5), 87 F. 2d 183, 184).

The Government for want of evidence to connect Ernest Weiss with the crime charged created inferences from his connection with another offense and his relationship with his brother Arnold who was one of the alleged co-conspirators. No one connected with the crime charged identified Ernest Weiss as one of the "partners" to the venture. Suspicion or conjecture cannot take the place of evidence.

The conviction of Ernest Weiss, it is submitted must be reversed.

See:

Gerson v. *United States* (C. C. A. 8), 25 F. 2d 49;
Caringella v. *United States* (C. C. A. 7), 78 F. 2d 563, 566;

Dahly v. *United States* (C. C. A. 8), 50 F. 2d 37, 43;

15 C. J. S. *Conspiracy* Sec. 93, p. 1150, and cases cited in notes 79, 80, 81.

Ferenc Weisz

There is really nothing against the defendant Ferenc Weisz insofar as the conspiracy charged in the indictment is concerned. His alleged connection with the Canadian affair cannot by inference, as we have shown in regard to Ernest Weiss, be used as the basis to make him "part and parcel of the conspiracy". The proof shows that his brother Arnold Weisz called Ferenc Weisz to the office of the "partners" of the main conspiracy to type an insurance agreement entered into between defendant Freier and Arnold Weisz, after one of the "partners", Abe Neumann, refused to type the same unless he was paid $5 (1644). At the request of his brother Arnold, Ferenc Weisz called to get moneys due Arnold from the conspirators, Hersch and Abe Neumann (344, 399). Again at his brother's request he allegedly delivered the package of platinum returned from Canada (209).

The Government's witness, defendant Koppel, testified that he had general conversations with Ferenc Weisz about platinum, but such talks were all outside of the conspiracy. This is the extent of Ferenc Weisz's participation.

Does this participation make Ferenc Weisz a "partner" to the conspiracy charged in the indictment? He had no stake in the conspiracy. There is no proof to show that Ferenc Weisz joined the conspiracy partnership. Such participation without an agreement to join the conspiracy cannot make Ferenc Weisz one of the co-conspirators. In the case of *Dahly* v. *United States* (C. C. A. 8), 50 F. (2d) 37, the general rule which should be applied here is stated (p. 43)

"Circumstantial evidence is equally available with direct evidence to prove the conspiracy, but suspicion and conjecture cannot take the place of the evidence. Guilt must be established beyond a reasonable doubt, and where the evidence is consistent with innocence as with guilt no conviction can properly be had. Even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of conspiracy. The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement and participation therein, * * *."

The proof in the case at bar does not show that Ferenc Weisz joined or participated in any agreement with the conspirators. Such evidence is lacking.

Lucadamo v. *United States* (C. C. A. 2), 280 F. 653, 657;
Marrash v. *United States* (C. C. A. 2), 168 F. 225, 231.

And as was said in *Marino* v. *United States* (C. C. A. 9), 91 F. 2d 691 at page 695:

"On the other hand, an accused must join in the agreement to be guilty of a violation of the statute, for even if he commits an overt act, he does not violate the statute unless he joined in the agreement."

(See copious citations of authority under notes 20 and 21 in the *Marino* case.)

The evidence against Ferenc Weisz, it is submitted, is too weak to sustain a conviction.

She may have participated in the Canadian affair, which, however, is not the crime charged in the indictment. In connection with the conspiracy charged, the testimony in the record reveals that Irene Weisz carried some platinum to her brother Arnold's office; but was not present when the platinum was delivered Silva for exportation (1491). That she was present when Koppel asked his "partners" for a pass to board the boat "Guine" (251) and she volunteered to get such a pass and obtained it for Koppel. This is the extent of her participation. It is significant that she was never present at conferences of the "partners" concerning the vital matters of their venture; and on one occasion she was told to step out of the room while the "partners" discussed something important (2783).

It is submitted that the evidence is inadequate to sustain Irene Weisz's conviction.

POINT V

The Circuit Court of Appeals erred in holding that the trial court did not commit reversible error in admitting platinum and Friedman's bank records as part of the Government's case against all of the defendants.

The defendants Ernest Weiss, Ferenc and Irene Weisz clearly had no connection with Mezenen nor were they in any way associated with Friedman. These defendants were not concerned with any conspiracy to export platinum through Mezenen and Mario via Clipper. Arnold Weisz's dealings with Mezenen were definitely extraneous and no part of any conspiracy involving these defendants. Nor was Friedman in privy with them. Yet the proof attending

Friedman's alleged connection with the extraneous deals of Arnold Weisz was admitted into evidence as against these defendants, as part of a single offense.

The *only* platinum introduced at the trial was the platinum found on Mezenen. The defendant Friedman made large bank deposits during the times alleged in the indictment. The source of these deposits was not shown by the Government still the Court allowed them into evidence, leaving it to the jury to decide on inferences and not on evidence where these deposits came from.

The introduction of the platinum (Exh. No. 51) was prejudicial and affected these defendants' substantial rights. This platinum was foreign to the activities and offense charged against them, yet this evidence is given to the jury as evidence against these defendants. This would be analogous to a situation where A and B commit a robbery, B and C commit another, and A is convicted on the money found on C.

The effect of the introduction of some platinum in the case can be readily surmised. For seven days the jury heard testimony about the precious metal, but saw no metal. And then, the F. B. I. produced the valuable metal for all to behold! The Court ruled it was admissible against all the defendants. So the defendants, here, are found guilty on platinum found on one Mezenen—a total stranger to them and by no stretch of the facts a co-conspirator.

The jury for days heard testimony on the shares contributed by each conspirator in each shipment. Each one's share was comparatively small. The defendants here contributed nothing. The bank accounts of Friedman (definitely not a co-conspirator) are at a later time introduced *en masse* by the Government. The Government shows no connection between these deposits and platinum or any conspiracy involving these defendants. The deposits are suspiciously large. Where did Friedman get the money?

The effect of this evidence is apparent. It served only the one purpose of implicating all the defendants with these unusual deposits.

It is submitted that this evidence, and the inferences raised by reason of its presence in the case was highly prejudicial and constituted reversible error as against the defendants Ernest Weiss, Irene and Ferenc Weisz.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

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